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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	MM Docket No. 97-234
of the Communications Act	)	
-- Competitive Bidding for Commercial	)	
Broadcast and Instructional Television Fixed	)	
Service Licenses	)	
	)	
Reexamination of the Policy	)	GC Docket No. 92-52
Statement on Comparative	)	
Broadcast Hearings	)	
	)	
Proposals to Reform the Commission's	)	GEN Docket No. 90-264
Comparative Hearing Process to	)	
Expedite the Resolution of Cases	)	

To: The Commission

**REPLY COMMENTS OF BEACON BROADCASTING CORPORATION**

Beacon Broadcasting Corp. ("Beacon"), licensee of noncommercial educational FM broadcast station WJCS, Allentown, Pennsylvania, through its attorneys, hereby submits brief Reply Comments concerning a few of the issues raised in the initial comments in this proceeding.

Beacon, in its own comments, asserted that the statute authorizing the FCC to use a system of competitive bidding to choose between mutually exclusive applicants for commercial broadcasting licenses does not permit the FCC to use competitive bidding where one or more of the applicants meets the Act's definition (47 U.S.C. § 397(6)) of a noncommercial educational broadcaster. *Beacon Comments*, pp 1-2. This same point is made, at greater length, in the NPR/NFCB/CPB Comments of National Public Radio, the National Federation of Community Broadcasters and the Corporation

for Public Broadcasting ("NPR/NFCB/CPB Comments"). *NPR/NFCB/CPB Comments*, pp. 5-8.<sup>1</sup> Beacon also made the point that nothing in the Section 3002 of Balanced Budget Act obliges the FCC to resort to competitive bidding between mutually exclusive applicants for FM translators licenses, which are nowhere mentioned in the statute or the various committee reports concerning the FCC's new competitive bidding authority. *Beacon Comments*, p. 3, n. 1. This, of course, follows from Beacon's and the NPR/NFCB/CPB Comments' first point, if one of the applicants seeks a license for a noncommercial educational FM translator. But there is also no strong policy reason for argument for requiring competitive bidding for FM translators. Unlike the FCC's irreparably broken comparative hearing procedures for full power stations, there is a system in the Rules (47 C.F.R. § 74.1233(d) through (g)) for resolving mutually exclusive applications for FM translators which is effective, is accepted by applicants, and serves the purposes of the FCC under Section 307(b) of the Act by assuring an equitable distribution of services. *Beacon Comments*, p. 4; *NPR/NFCB/CPB Comments*, p. 23.

The NPR/NFCB/CPB Comments propose that the FCC should, in this proceeding, provide that noncommercial educational applicants seeking to replace a displaced translator should receive permits on a first-come, first-served basis. *NPR/NFCB/CPB Comments*, p. 23. This would be particularly important if the FCC were, for some reason, to conclude to use competitive bidding for FM translators notwithstanding that there is no compunction in the statute or legislative history to do so. Because FM translators are so important to the maintenance and expansion of noncommercial educational service, for reasons outlined in both Beacon's comments and the NPR/NFCB/CPB

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<sup>1</sup> See also *Joint Comments* by the law firm of Schwartz, Woods & Miller, on behalf of a number of public broadcasting and ITFS licensees, pp. 3-4.

Comments, noncommercial educational licensees should not be required to wait for a periodic "filing window" to seek to replace lost service. Granting applications to replace displaced noncommercial educational service on a first-come, first-served basis would, moreover, be consistent with Congress's direction to the FCC to use engineering solutions and other tools to avoid mutual exclusivity altogether. 47 U.S.C. § 309(J)(6)(E).

Beacon proposes one further refinement of the FM translator selection rules. First-come, first-served processing of applications by displaced noncommercial educational FM translator licensees should be limited to applications for translators that receive the input signal off-air, by translator relay, or direct microwave feed. FM translators that transmit a signal received via satellite distribution stand in a much different relation to the populations within their service areas and no single such translator station is in any sense essential to the maintenance of existing service from a full-power noncommercial educational station.

Whatever system the FCC adopts for resolving mutually exclusive applications by commercial and noncommercial educational applicants for full power stations -- without competitive bidding -- three principles must be kept in mind. First, the FCC should not adopt criteria that require inquiry into areas proscribed by Section 326 of the Act and the First Amendment.<sup>2</sup> Criteria which favored some types of programming over others would violate this principle. Second, the FCC should avoid criteria which are constitutionally suspect because they favor certain groups over others. *See, e.g., Adarand Contractors, Inc. v. Pena*, 515 U.S. 200 (1995); *Hopwood v. State of Texas*, 78 F.2d 932,

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<sup>2</sup> "Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation . . . by the Commission . . . shall interfere with the right of free speech by means of radio communication." 47 U.S.C. § 326.

945-946 (5th Cir.), *cert. denied* 116 S. Ct. 2580(1996)(“the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional”). Third, and at a much more practical level, the FCC should recognize that complex and protracted selection proceedings are beyond the resources of virtually all noncommercial educational broadcasters and would disadvantage noncommercial educational applicants as effectively as a system of competitive bidding. Accordingly, the FCC should adopt criteria which are objective and do not require formal hearing proceedings to apply, and tie-breaking procedures in the event two or more applicants are ranked equally. (For example, in such cases, the FCC could decide to grant the first-filed application and resort to random selection where applications were filed on the same day.)

### **CONCLUSION**

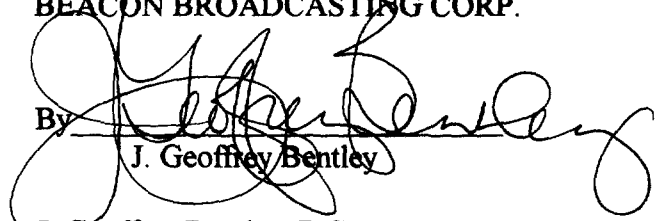
The statute authorizing the FCC to adopt a competitive bidding system to resolve mutually exclusive applications for initial broadcast licenses does not allow the FCC to force noncommercial educational applicants, as defined elsewhere in the Act, to bid against commercial applicants. Where noncommercial educational applicants seek licenses for FM translators, the existing criteria will be sufficient to resolve mutually exclusive applications. However, displaced noncommercial educational FM translator licensees should not be required to wait for filing windows to seek to replace service that has been involuntarily discontinued. Those applications should be processed on a first-come, first-served basis. Any criteria for choosing between mutually exclusive applicants for full power stations where, because of the statute, competitive bidding is not available should be carefully tailored

to avoid constitutional issues and also easily administered without placing undue demands on the limited resources of noncommercial educational applicants.

Respectfully submitted,

BEACON BROADCASTING CORP.

By

A large, stylized handwritten signature in black ink, appearing to read "J. Geoffrey Bentley". The signature is written over a horizontal line that serves as a separator between the signature and the printed name below it.

J. Geoffrey Bentley

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February 17, 1998

**CERTIFICATE OF SERVICE**

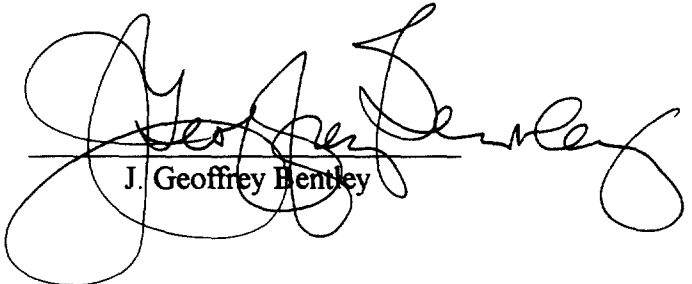
I hereby certify that I caused a copy of the foregoing Reply Comments of Beacon Broadcasting Corporation to be served, this 17th day of February 1998, by first-class United States mail, postage prepaid, upon the following persons:

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